No. 2509

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY (a corporation),

Plaintiff in Error,

vs.

GRACE MUSTELL, as administratrix of the estate of Fred G. Mustell, deceased, and as the personal representative of said Fred G. Mustell, deceased, for and on behalf of Grace Mustell and Ruth Mustell, the widow and minor child, respectively of said Fred G. Mustell deceased,

Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

CHARLES S. ALBERT,

THOMAS BALMER,

P. O Address: Great Northern Passenger Station, Spokane, Spokane County, Washington.

Attorneys for Plaintiff in Error.

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The brief of the attorney for defendant in error, hereinafter referred to as the plaintiff, is based not so much upon the facts as disclosed by the evidence

as upon the theory of plaintiff's case, which he had hoped to prove upon the trial, and did not. The statements made in his brief of what he claims the evidence showed are made in an effort to befog the testimony by claims, and thereby cause the court to say that there was substantial evidence to go to the jury on the issues of the character of the movement and the assumption of risk.

The brief of the plaintiff in error, hereinafter referred to as defendant, quotes all the evidence relating to the questions raised, while that of the plaintiff not only leaves out important parts of the testimony, but consists mainly in abuse and misstatements relating to the plaintiff's own witnesses.

The "Statement of the Case" by plaintiff contains statements, which, to say the least, ought to be considered in the light of the evidence in the case. We quote in italics these statements, and immediately after quote the evidence relating to them, which will show that the statements are not based upon fact.

Plaintiff's counsel says that Cantley and Mustell were *"passing through that part of the yard through which it was usual and customary to pass on such occasions. In doing so it became necessary for him to cross over Track No. 1."* (Brief Defendant in Error, p. 4.)

His own witness Cantley on cross-examination testified with reference to the usual way:

"Q. Mr. Plummer asked you about the usual way in which you crossed there at this particular point. Do you recall any other time that you ever went over at that particular point before?

A. Well, we never paid any particular attention to the particular parts where we are going when we are busy.

Q. You go back and forth across the tracks anywhere you want to, don't you?

A. Yes, sir.

Q. You go up and down in between the tracks or did at that time wherever you wanted to?

A. Yes, sir.

Q. You and Mustell and these other employes,—well you and Mustell, that is right, isn't it?

A. Yes, sir.

Q. What do you mean by saying you went the usual way across there, Mr. Cantley?

A. Well, just a way to get to the depot out on the main line and up the main line." (T. 41.)

"In doing so it became necessary for him to cross over Track 1." (Brief Defendant in Error, p. 5.)

"Q. And in walking you could have walked if you and he wanted to between Tracks 1 and 2 without any difficulty, isn't that a fact?

A. Yes, sir.

Q. And you could have gone up to the lead and walked along the lead and walked across right at the depot?

A. Yes, sir.

Q. Without crossing anything out there to the main line, isn't that right?

A. Yes, sir.

Q. And there was plenty of room between the two tracks, tracks 1 and 2, between anyone of those tracks 4 and 5, or 4 and 3, and so on, for you to have walked up there if you had wanted to?

A. Yes, sir."

(Cantley's testimony on cross-examination as plaintiff's witness, T. 40.)

"Upon which was standing perfectly still, tied down by brakes, a string of sixteen box cars." (Brief Defendant in Error, p. 5.)

This statement is an attempt to mislead the court into believing that all of the sixteen box cars were tied down. This idea is attempted further later in plaintiff's brief.

"We had about ten cars in on No. 1 Track, and the field man, Mr. Miller, set three brakes, enough to hold the cars in far enough, so that we could project some more against them."

(Testimony of Steinhouse, the switch foreman, T. 75.)

"Mustell and Cantley attempted to cross said Track No. 1 a reasonably safe distance from the end of said string of cars, the distance being anywhere from one foot to ten feet." (Brief Defendant in Error, p. 5.)

There is not the slightest evidence that the distance which they were from the end of the car "was a reasonably safe distance". Cantley in testifying for the plaintiff on cross-examination said the dis-

tance was "well, about three or four feet, somewhere along there; I wouldn't be positive".

> "Q. You think it was as far as from the arm of the chair to the corner there?
> A. Yes, sir."

This distance was found on measurement to be two feet. (T. 38.)

He said he would not *swear* to the distance, whether it was one foot or ten feet. (T. 41.)

> "I testified on the other trial substantially as I did here that the distance was about so much, between two and three feet, and at that time I said the distance was from two feet up, I couldn't tell exactly." (T. 42.)

A. Thomas, a car repairer working in the yards testified:

> "I didn't see the car hit him, but he was very close to the car the last I seen of him. He was coming up through the yard and went to cross over from track 5, over towards the main line. He and Mr. Cantley came up through the yards, apparently not paying a great deal of attention to where they were going or anything.
> * * *
>
> Cross-Examination by Mr. Plummer.
>
> Q. Didn't make any note of how far he was from the car, or anything about it did you?
> A. Well, he was crossing,—well, I started to say that he was starting to cross pretty close to the car. When we are working in the yards and see anyone close to the cars we generally notice it." (T. 83.)

"There was nothing to indicate to Mustell or Cantley that any cars were being kicked down upon

the standing string of cars." (Brief Defendant in Error, p. 5.)

"Q. When you got close to track 1, state whether or not you saw any indication of any train or cars or backing against this string of cars that caught Mr. Mustell, or anything to indicate that anything was being moved on that track No. 1 in the direction of this string of cars that struck Mustell.

A. Well, as we were crossing there we were not paying particular attention to that.

Q. I didn't ask you that, Mr. Cantley, I am asking you if you saw anything?

A. I can't say that I did or did not, because we were not paying any attention."

(Cantley's ~~Mustell's~~ direct examination, plaintiff's case, T. 32, 33.)

"The smoke of which engine was going straight up, which indicates to any rational person that the engine must have been standing still." (Brief Defendant in Error, p. 5.)

"Just before crossing I glanced up that way and saw an indication where the switch engine was by the smoke. I just saw the smoke coming out of there. I supposed out of the engine up there * * *

Well, it was going apparently straight up * * *

Q. When the smoke is going straight up, what does that indicate, according to your experience there in the yard with reference to the engine standing still or going?

A. Well, I don't know; I can't very well say because sometimes when they are working

hard they go straight up, and other times they don't."

(Cantley's testimony, direct examination for plaintiff, T. 33.)

However, in spite of this contradiction of his theory, plaintiff's counsel argues that *"the movement of the engine could be determined by the smoke and puffing, providing the engine was shoving a string of cars with it, but if the string of cars was kicked in, the engine would still remain standing at the point from which the kick was made and the smoke would go straight up as it did."* (Brief Defendant in Error, p. 5.)

When a kick is being made he could just as well argue that the engine would follow after the kick, or would run away from the cars or would stand still. In other words, he could not tell from the smoke, that it was standing still and there is nothing in the evidence to indicate from Cantley's testimony whether the engine was shoving, kicking or pulling the cars.

"If a string of cars were kicked in on the string that was standing still that hit Mustell, in the ordinary manner, or in a reasonably careful or usual manner, it would take up the slack of the standing string of sixteen cars, which would give Mustell sufficient warning." (Brief Defendant in Error, p. 6.)

This is a conclusion or inference which plaintiff's counsel would like to draw. This theory, which is

not based on testimony,—is refuted by the only testimony in the case upon the subject, that of Mr. Garvin, who testified that with an engine going three or four miles an hour, the far car would "run away with the impact".

> "Q. What is the movement of the end car?
> A. The end car, it starts very suddenly, the spring pressure goes up first before the car moves and then when it moves it moves suddenly. That is the usual occurrence when you are coupling."
>
> (Garvin's testimony on direct examination for defendant, T. 92.)

On cross-examination he testified:

> "Q. Now if you were passing across the end of a car and you would hear the crash as the cars came into the end of the string, and immediately the head car moved very violently and very suddenly, and you did not hear any continuation of the coupling, taking up of that slack, then you would say the slack was out, wouldn't you?
> A. I would say the slack was up. That would be in.
> Q. It would take considerable force, wouldn't it, to send those cars suddenly and violently, turn cars on that track, with that suddenness I have described, wouldn't it?
> A. No.
> Q. Wouldn't use much force?
> A. No.
> Q. Do you pretend to say that could be done, if an engine was going through at 3½ miles an hour?
> A. I do.
> Q. So that a man couldn't get out from behind it?

A. No, I would not say that. I say it moved that way, moved violently, I say, because the slack is there and the very minute the forward car moves the hind one has got to move." (T. 94.)

"The movement of the standing string of cars was caused by another string of cars being thrown in on Track No. 1." (Brief Defendant in Error, p. 6.)

There is not a particle of evidence to approach a foundation for such a statement. This feature of the case is fully covered upon pages 29 to 34 of the brief of plaintiff in error by direct quotations from the testimony. From these quotations it conclusively appears, without a particle of testimony to contradict it, that a string of cars was switched in onto the track upon which a string was already placed; that they intended to move the string already there three or four car lengths, to put them where they were afterwards placed; that they did not make the coupling at first and did not move the string of cars, and they pushed on back, made the coupling in the usual manner, and that the end car moved quickly as it would do when a coupling was made, and that "they shoved the cars down three or four car lengths".

"No bell or other signal was given." (Brief Defendant in Error, p. 6.)

"Mr. ALBERT. There is one phase of this case that I don't know whether there is going to be

any claim on or not; I did not notice any evidence introduced in plaintiff's case with respect to it, and that is with reference to the question of bell or whistle signals. Do you make any claim on that, Mr. Plummer?

Mr. PLUMMER. Certainly. We claim you ought to have a *rule* or some manner of warning, and you didn't have any.

Mr. ALBERT. There is no claim there was any custom in the yards as to bells and whistles.

Mr. PLUMMER. I don't know anything about that, whether there is or not. *We have not offered any proof to show any custom as to bells and whistles.* I will say that the only thing we will claim with reference to bells and whistles is that if they had been given, it would have tended at least to warn plaintiff of the imminence of his danger. We have not offered any proof to show that it was customary to ring a bell or that it was not, but we do insist that that is one of the ways that a rule could have been prepared to give warning." (T. 72.)

(4) Was the defendant negligent in failing to provide a rule for the warning of employes such as Mustell?

Answer: No.

(Special Findings of Jury, 23.)

The *Ryan* case in 53 Wash. 279; 101 Pac. 880, quoted from on page 49 of brief of plaintiff in error, holds specifically that it is not necessary to ring bells or give other signals in such operations in freight yards.

The so-called STATEMENT OF THE CASE prepared by plaintiff's counsel, has been demonstrated, we believe, to be utterly unreliable, and prepared with

a deliberate attempt to make claims of evidence, which evidence does not in fact exist, solely for the purpose of getting the court to take the position that because of such claims, there must be some conflict which could have taken the case to the jury. In our brief we quoted all of the evidence relating to the questions raised, and we respectfully refer the court to these quotations and statements thereof, contained therein, and to the transcript, for the consideration of the court in determining the questions here involved.

The argument of counsel for the plaintiff is based in the very first instance on a false premise. He says that the motion for directed verdict was thoroughly argued before Judge Rudkin. The record on page 95 of the transcript shows exactly what occurred on the submission of the motion to direct a verdict; that the motion was made, and the court said:

> "I think I will let the case go to the jury, and you can have my ruling reviewed by the Circuit Court, or I may review it myself on application." (T. 95.)

The order made on the motion for judgment distinctly states that it was not argued. (T. 105.)

Counsel has seen fit to go outside of the record. He says: "This case was partly tried in the Superior Court of Spokane County, and upon plaintiff's motion a voluntary nonsuit was granted and suit brought in the federal court." It *was* tried in

the state court, and at the end of the evidence defendant moved for a directed verdict. *The court stated that no negligence had been proven,* and then plaintiff moved for a voluntary nonsuit, which the defendant was powerless to prevent. Plaintiff then took the case out of the court in which it had been determined that the defendant was not negligent, and brought it in the federal court, to take a chance that he could prevail upon the judges of this court to hold contrary to the state court that he had established a case of liability.

As we anticipated, plaintiff has attempted to discredit the testimony of the only witnesses called to prove the case against the defendant. These two witnesses, Cantley and Farmer, were subpoenaed by the plaintiff and the defendant both. Both of them talked with the attorneys for each of the parties. Plaintiff's counsel says that he took a statement from Cantley. The record discloses no such statement. It certainly was not offered on the trial. The statement taken by the attorney for the plaintiff from Farmer was offered by *defendant* in evidence. This statement is identical with the testimony given by him upon the trial. Six different times the witness testified that the cars were first coupled up, run about a car length and that a cut was then made, the cars continuing for a distance of about four or five car lengths in all. (T. 43, 48.) This testimony is fully discussed in the brief of the plaintiff in error. (pp. 33-37.)

The effort on the part of the respondent to confuse and mislead the court is shown by quotations from Farmer's testimony on page 11 of his brief. The quotation as made in the brief would indicate that the testimony is consecutive, and that all that Farmer testified to could be found as quoted in that brief. He omits to quote the statement made on the same page of the transcript, "the sequence of how these things happened was when we were backing in just before we coupled on the other cars, Mr. Steinhouse told me to cut the cars off at a certain place, which I went to do, and before I got to where the coupling was they coupled up and I pulled the pin. That there is where you get 'just before' in that statement. It was not meant just before the cars were coupled that I cut them off." (T. 47.)

"The cars ran down upon their own momentum, striking the sixteen cars." (Brief Defendant in Error, p. 11.)

This is shown by all of the testimony not to be the fact. (See Plaintiff in Error's Brief, pp. 18, 19, 20, where all the testimony relating to the movement is fully referred to.)

Plaintiff predicates his entire claim of negligence on this question and answer:

> "Q. If it was necessary to move that string of cars four or five car lengths, was there anything to prevent the engine from pushing them on that distance and then cutting off?
> A. No, sir."

The evidence of every witness in the case shows that the engine was not cut off until after the train had moved a car length, which was after Mustell had been hit, and therefore the cutting off of the engine, as an element of negligence, is entirely out of the case. (T. 75, 44.) Furthermore, their own expert witness O'Brien, testified that it was proper railroading to kick them after you coupled into them, and send them four or five car lengths (T. 62), which is just what plaintiff claims was done in this case.

Counsel argues that according to Cantley's testimony the cars were kicked in. If, as they say, he knew it, then he knew it by observation before the collision, and he must have observed this movement, up at the head end before the cars came together, which would have given them both plenty of time to have gotten out of the way, and would have notified them of the danger which plaintiff claims existed by reason of the kicking. However, Cantley testified directly that there was no difference in the movement of that car at that time than other movements in the yards previous to that. (T. 78, 80.)

It makes no difference, however, whether the cars were shoved or kicked, as the effect of a shove or kick upon the end car or the car which was nearest Mustell would be precisely the same. The impact of the coupling made for either purpose, shoving or kicking, would be exactly the

same, and would cause the car nearest Mustell to move suddenly, by reason of the springs in the couplings. The testimony is conclusive, and without contradiction, that an engine making the coupling for either a shove or kick, going at three and one-half or four miles an hour, would cause the end car to move suddenly; that the very moment the forward car moves, that is the car which is being coupled up, the hind car has got to move. (Testimony of G. F. Garvin, T. 92-95.) So that the entire attempt to discredit his own witnesses is without avail, for, even assuming that the cars were kicked in, as plaintiff's counsel claimed, the effect upon the end car would be precisely the same as when shoved in, and counsel admits, in effect, in his brief upon page 22, that if that be a fact, the judgment should be reversed. This attempt to discredit his own witnesses, Cantley and Farmer, is made for the purpose that if such discredit be shown, it might be claimed that it was a question for the jury to say whether they should be relieved or not, and if not, whether the jury ought to believe something that they had not testified to. We have known of no court upholding such a contention. The effect of such a holding would be that a verdict could be predicated, not upon the evidence introduced, but upon a lack of evidence which was necessary to plaintiff's case.

The alleged foundation of this discredit is a presupposed duress of an employer upon employes, not shown to be a fact by any evidence in the case.

It was not the fact, and there is no evidence to show it, upon which any claim to that effect can be based, that the witness Farmer was an employe of the defendant when the case was tried. Counsel for the plaintiff knows this, and his attempt to convey that impression to the court throughout the entire discussion of the case in the brief, is made purely and solely for the purpose of confusing and misleading the court.

This purpose is again shown on page 25 of his brief. He attempts to convince the court that this was an extraordinary and unusual movement, by pretending to quote from the testimony of Cantley with reference to the manner in which it occurred. If the court will take the testimony quoted on page 25 of the brief of defendant in error, and compare it with the testimony as found upon page 34 of the record, from which it is pretended to be quoted, it will find that this very important question and answer were omitted, and from the context appears to have been omitted intentionally.

> "Mr. PLUMMER. Q. Just state the relation between the coming together of the string of cars onto the cars that were standing still that you say you heard the crash,—the relation between the crash and the movement of this car that hit Mustell; what I want to get at is whether or not it was simultaneous or otherwise.
>
> A. Well, it moved very quickly afterwards, *you know how it would be when a coupling is made, how quickly the cars would move.*"

Counsel attempts to make a point of the fact that the witness Garvin testified that the cars being

coupled with an engine going 3½ or 4 miles an hour, would move suddenly and violently.

"Q. So that a man couldn't get out from behind it?

A. No, sir, I wouldn't say that."

Of course, he wouldn't say that, if the man who was behind was at an absolutely safe distance from the end of the car, for instance, if he was thirty or forty feet or a car length away. This man was within three or four feet of the car end, and was noticed by one man who testified that he was very close to the car, the last he saw of him, so close that he took particular notice of him. (T. 82, 83.) Furthermore, counsel omitted in his quotation to cite the rest of the evidence, which was part of the same testimony, "I say it moved that way, moved violently, I say, because the slack is there and the very minute the forward car moves the hind one has got to move" (T. 94), showing that a violent and sudden movement must be expected when a coupling is made, regardless of whether the movement is a kick or a shove.

That Mustell was "exceptionally careful", a statement made by plaintiff's counsel, has no foundation in the evidence, and is a pure figment of counsel's hopeful imagination. His indulgence in the alleged presumption that "inasmuch as Mustell is now dead, that he was an extraordinarily careful and active person" has no basis in any decision of any court. Any presumption that Mustell was in the exercise of due care is overcome by the actual

facts shown at the trial that he was well acquainted with the movements in the yard; that this movement was an every day occurrence during the four years that he was there; that when cars were coupled, shoved or kicked, the end cars moved suddenly by reason of the springs in the coupling and the impact, just as these cars did, and that knowing these facts he walked within three or four feet of the end of the car, without paying any attention to what was going on, and when his attention was not engrossed in his work.

As a final attempt to throw dust in the eyes of the court, counsel for plaintiff below says that because the engineer was not called it must be inferred that his testimony would have been unfavorable to the defendant. As to just what particular point this inference is to apply, he does not say. What could he have testified to that was not already testified to by other witnesses? He was down at the other end of the train, which according to the claims made by counsel for the plaintiff was from 16 to 26 cars from where the accident occurred, a distance of from two to four blocks. Mustell's companion testified directly to what occurred at the point of the accident. Thomas who was the other of the eye witnesses also testified as to that. The field man who was close to him; the man who followed the engine; the switch foreman, the fireman, the general yardmaster and the assistant yardmaster all testified as to the manner in which the switch was made, the movement, the force used, the

speed of the cars and engine and the effect thereof, and every possible thing that the engineer could have testified to. We are frank to say that it never occurred to us, in view of all of this evidence, that it would be necessary to cumulate it by the engineer's testimony, in order to save ourselves from the insinuations contained in plaintiff's brief.

But this claim of counsel illustrates the sole basis upon which this case is appealed. It is not what the evidence shows, but what counsel failed to show that he desires this court to support a judgment on.

The case of *Williams v. Bunker Hill & Sullivan Mining and Concentrating Co.,* 200 Fed. 211, is directly in point in determining that this case is one in which Mustell was shown to have assumed the risk. In that case the danger was a concealed one. In this case the attention of Mustell had been expressly called to the danger by Kipple (T. 84), who testified about the danger of approaching trains in the yards, movements on the track, trains moving at any moment, and to always keep clear of them, and his own instructions given to Cantley the very morning of the accident, to be careful about climbing on cars: **"that they were liable to switch there most any time and kick a bunch of cars in there, and I would get hurt at it"** (T. 77) clearly shows that he had appreciation of the danger referred to in the *Williams* case and in the *Butler* case, quoted therein. The testimony is uncontradicted that they shoved and coupled cars in the yards, and that these

movements were taking place every day, continually all day long on the tracks, during all the time that Mustell had worked there for four years, that the cars would move quickly and suddenly, and that this method of operation had been constant during all that time.

In the language of the Supreme Court in the *Butler* case:

> "Where the conditions are constant and of long standing and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."
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> *Butler v. Frazee,* 211 U. S. 459; 29 Sup. Ct. 136; 53 L. Ed. 281.

Respectfully submitted,

Charles S. Albert,
Thomas Balmer,
Attorneys for Plaintiff in Error.